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FAMILY LAW REFORM IN THE 1980's*

Mary Ann Glendon**

We are all familiar with the folksy wisdom expressed in the saying, "If it isn't broken, don't fix it." The experience of the past twenty years, when far-reaching changes were made in the family law of nearly every American state at the same time that American family behavior was undergoing rapid and profound changes, suggests a corollary or two to this saying: "Don't fix it until you know what's wrong with it," or, "Don't fix it while it is right in the middle of falling apart." It is beginning to seem that the 1960's and 1970's—when divorce rates and women's and mothers' labor force participation rates were increasing at unprecedented speed, when the female-headed, single-parent family became the fastest-growing family type in the United States, and when informal cohabitation approached Scandinavian proportions—were not ideal times for sober and reflective law reform efforts. Whether or not the time was right, however, there was more activity in American family law in that twenty-year period than there had been in the preceding hundred years.

In view of the more or less continuous upheaval in patterns of family behavior during the past twenty years, a reasonable reaction to the foregoing observations would be to ask whether we have any grounds to suppose there will ever be a time when family law reform can proceed under better conditions. According to recent data from the United States Census Bureau, the answer seems to be yes, and that time is the present. The reason is that many of the trends of the 1960's and 1970's appear to have peaked and levelled off.

In a statement made in 1979 before the United States House of Representatives Select Committee on Population, Census Bureau Demographer Paul Glick stated that the United States seems to be entering a period of relative stability in family behavior.¹ He pointed out that changes in family life are strongly related to changes in the birth rate, to the school and college enrollment rates, and to women's labor force participation rates. The birth rate, he noted, has declined about as far

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* The author's proposals concerning property distribution on divorce were first put forward in M. Glendon, *The New Family and the New Property* 80-84 (1981), and in a lecture at Cambridge University in 1981. Glendon, *Property Rights upon Dissolution of Marriages and Informal Unions*, in *The Cambridge Lectures—1981*, at 245-67 (N. Eastham & B. Krivy eds. 1983). In the first part of this article, which deals with that subject, parts of the Cambridge lecture have been expanded and updated.

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1. Glick, *The Future of the American Family*, in Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports: Special Studies* 1-6 (series P-23, no. 78 1979).

as it can go, with the average family expecting to have no more than two children.² The great increase in high school and college enrollment in the 1960's and 1970's has also levelled off.³ As for women's labor force participation (which jumped from thirty-eight percent in 1960 to fifty-two percent in 1980, and increased even more dramatically for mothers of pre-school and school-age children),⁴ Glick said that "the odds seem to favor a slackening of the rate of increase . . . over the next decade or two."⁵ The divorce rate, that potent generator of legal issues, more than doubled between 1963 and 1975, but has fluctuated little and even declined slightly in the past few years.⁶ Glick concluded his 1979 report by predicting that "most of the changes in family life over the next two decades will be small as compared with those during the last two decades."⁷

If Glick's prediction is correct, we are presently in a better position than we have been in for many years to take stock of our situation and to try to determine what kinds of legal measures will be appropriate for the current needs and desires of American families. It follows, too, that states like Louisiana that did not jump hastily on the family law reform bandwagon now have the opportunity to attack the most pressing problems in the area in a more calm and rational way than some of their sister states. Indeed, the writer will go further, in the case of Louisiana, to suggest that, now that the dust is beginning to settle, certain institutions of the civil law which at various times during the past twenty years may have seemed outmoded to some observers, now reveal great promise for approaching some of the most challenging contemporary family law problems.

But let us not minimize the difficulties. Even though the demographic data indicate that changes in American family behavior in the near future will not be so rapid or profound as they were in the 1960's and 1970's, the data also plainly tell us that there is no going back to the way things were. The cyclone may have passed, but the landscape has changed irrevocably. Thus, before turning to specific issues of family law reform for the 1980's, it might be well for us to remind ourselves of some of the principal features of our current and foreseeable situation. Again, the writer is relying, not on the wild speculations of futurologists, but on prosaic documents issued by the United States Government Printing Office. Nearly half of all marriages now being formed are expected to end in

2. *Id.*, at 1.

3. *Id.*

4. S. Bianchi & D. Spain, *American Women: Three Decades of Change* 1, 15-18 (Bureau of the Census, U.S. Dep't of Commerce Aug. 1983).

5. Glick, *supra* note 1, at 1.

6. S. Bianchi & D. Spain, *supra* note 4, at 3; Glick, *supra* note 1, at 2-3.

7. *Id.* at 5.

divorce,⁸ and about sixty percent of all divorces now involve couples with young children,⁹ a figure that can be expected to decline slightly as the population ages. After divorce, about ninety percent of these children remain in their mother's custody, a figure that has not changed much since 1960¹⁰ despite twenty years of sex-neutral laws, a great deal of "consciousness-raising," and the impression created by films like *Kramer v. Kramer*. It is estimated that nearly half—four of ten—of all American children will spend a significant part of their childhood in a single-parent family before reaching age eighteen.¹¹ In 1982, twenty-two percent of all children under eighteen were in such families.¹² The financial circumstances of female-headed households are precarious. The mothers' standards of living typically fall precipitously after divorce, even though their labor force participation rates go up.¹³ Many fall below the poverty level. Indeed, the poverty population has become largely a population of women and children.¹⁴

The unprecedented nature of many of the phenomena facing the family law reformer today means that we cannot simply plug in legal devices which worked well in an earlier time and under different conditions. Law reform in the 1980's will require us to muster all our collective imagination, intelligence, expertise, good will, and concern for our fellow men, women, and—especially—children. On the occasion of this Family Law Colloquium, the writer would like to discuss three specific areas where law reform has become necessary because of changed social and demographic conditions, and where the common-law states have, in the writer's view, something to learn from the approach of the civil law. These are the areas of reallocation of family property upon divorce, private ordering of marital property relations through contract, and protection of family members against disinheritance.

REALLOCATION OF FAMILY PROPERTY UPON DIVORCE

Of these three areas the one in which recent legal change has been

8. S. Bianchi & D. Spain, *supra* note 4, at 3.

9. Divorce, Child Custody, and Child Support, in Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports: Special Studies 8 (series P-23, no. 84 1979) [hereinafter cited as Divorce].

10. Glick, *supra* note 1, at 2-3.

11. Divorce, *supra* note 9, at 3.

12. Marital Status and Living Arrangements: March 1982, in Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports 5 (series P-20, no. 380 1983).

13. Grossman, Divorced and Separated Women in the Labor Force—An Update, 101 Monthly Lab. Rev. 43, 43 (Oct. 1978); Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1265-66 (1981). See generally C. Adams & D. Cooper, A Guide for Judges in Child Support Enforcement 1-9 (1982); U.S. Comm'n on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children (1983).

14. Divorce, *supra* note 9, at 1-2.

most dramatic is that of property division upon divorce. In barely ten years, following the example of the Uniform Marriage and Divorce Act (U.M.D.A.) as amended in 1973,¹⁵ nearly all American separate and community property states have abandoned their systems of fixed rules for determining how property should be allocated after divorce and have gone over to variants of systems which give the courts substantial discretion to disregard legal title (or the distinction between community and separate property) and to redistribute the spouses' property in the manner that the judge considers fair.¹⁶ Usually, but not always, the judge is provided with a set of statutory guidelines for the exercise of such discretion. These schemes, which were presented to state legislatures under the name "equitable distribution," are more properly called discretionary distribution, since what consistently distinguishes them from their predecessors is not that they are more equitable, but that they are more unpredictable. These statutes, adopted in haste, are now giving the states that adopted them the opportunity to repent at leisure.

In the first place, the system of discretionary distribution, because of inconsistency in results among apparently similar cases, is widely perceived as unfair by litigants. Second, this unpredictability of outcome means the law in this area is not serving one of its most important purposes: to furnish a basis for negotiation and future planning by the parties. This is especially important in view of the fact that over ninety percent of divorce cases are settled by agreement. Third, these laws and their guidelines offer the opportunity for, and even encourage, abuse of the litigation and negotiation processes more than do systems of fixed rules. Fourth, it is seriously open to question whether consensus supports, or any rational policy is served by, a view of marriage in itself as engaging all one's property no matter when or how acquired, when it is estimated that nearly one marriage in two will end in divorce, many of them within the first few years. Fifth, discretionary distribution has been accompanied by developments in the law governing marriage contracts that make it extremely difficult for lawyers to assure persons who have legitimate desires to contract out of the system that they can avoid its operation. In sum, the existing law in most states throws divorcing spouses—and their children—into a lottery whose outcome greatly depends on the luck of the judicial draw and the competence of counsel, and in which the only sure winners are the lawyers.

The remedy for all these defects of discretionary distribution, however, is not simply to go back to the predecessor systems of separate property

15. Unif. Marriage & Divorce Act § 307, alternative A, 9A U.L.A. 142-43 (1973) [hereinafter cited as U.M.D.A.].

16. For a discussion of this process and a description of the statutes, see generally M. Glendon, *The New Family and the New Property* 57-68 (1981).

and community of acquests. One reason for the widespread adoption of discretionary distribution was that those older systems were not functioning well in the new world of no-fault divorce, which removed the leverage an economically weaker spouse usually had in bargaining with a partner who wished to terminate the marriage. The separate property systems were perceived as unfair, especially to women who had stayed home to raise children and who had no income or property of their own. Traditional community property systems had the defect that a flat, equal division of acquests often requires the sale and division of the proceeds of the family's only substantial asset, the marital home, with resulting hardship to the children and the custodial spouse.¹⁷

In the writer's view, it is becoming increasingly apparent that there is no satisfactory way of handling the economic aspects of modern divorce within the conventional framework of matrimonial property and family support law. Is there some other way to cut through these problems? The writer believes there is. It makes sense to begin, not with some vague notion of partnership, but by looking at the features which the statistically most frequently-occurring types of divorce have in common. At once, three facts stand out: (1) Most divorces (about sixty percent) involve minor children;¹⁸ (2) most divorces involve marriages of relatively short duration;¹⁹ and (3) the property of most divorcing couples, especially in these two categories, includes few assets besides the marital home and household goods, the earning power of the spouses, and, in the case of middle-aged persons, their pension rights.²⁰ Further, it seems probable (1) that there is a fairly substantial consensus in our society on several aspects of how these facts (and their various permutations and combinations) should be treated in divorce; (2) that this consensus is already being reflected, albeit somewhat haphazardly, in the behavior of the courts; and (3) that if these suppositions are correct, certain changes in the law are both feasible and indicated in the 1980's.

Almost everyone in Western countries would agree that, in principle, the basic rules of matrimonial property law, like those of intestate succession law, should be framed with the needs and desires of the majority of people who will potentially be affected by them in mind. From this point of view, however, the main problem with existing marital property and support law in most American states is that it contemplates, not the typical case or cases, but a special case. That special case, as exemplified by the U.M.D.A., is that in which sufficient property exists to permit

17. For a recent critical examination of the equal-division principle, see Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 *Wis. L. Rev.* 789, 826-42.

18. Divorce, *supra* note 9.

19. Glick, *supra* note 1, at 2.

20. M. Glendon, *supra* note 16, at 91-96.

a clean break between the spouses.²¹ The principal defect shared by most existing laws and the major law reform proposals such as the Uniform Marriage and Divorce Act is that their basic premises are inapplicable to nearly three-fifths of all divorces—those that involve minor children. For example, U.M.D.A.'s principle that there should be no maintenance to a former spouse unless special needs exist²² must be applied by courts in a world where the majority of cases involve a *custodial* spouse who, for that reason alone, *does* have special needs. To be sure, the fact that a spouse may be caring for young children is mentioned in the U.M.D.A. guidelines on need,²³ but why make the prevailing situation the exception rather than the starting point? The rehabilitation principle, which would limit maintenance to the short period necessary to make the formerly dependent spouse self-supporting, is even less suited to the situation of the custodian of young children who typically will not be able to combine child care with highly remunerative market work. In sum, the idea of effecting a clean break by dividing property between the spouses and excluding maintenance after divorce does not come to grips with the fact that no legal system has been able to achieve this result on a widespread basis because, in most divorce cases, children are present and there is insufficient property. All these reform models are examples of Thomas Reed Powell's famous definition of the legal mind as the mind that can think of something that is inextricably connected to something else without thinking of what it is connected to.

In 1980, the English Law Commission said with respect to divorce suits that involve minor children:

In such cases it may well be thought the primary concern must be for a broken family rather than a broken marriage; and the welfare of the children, social, psychological and economic, should take precedence over the adjustment of financial rights and duties of former spouses toward each other.²⁴

21. The prefatory note to the U.M.D.A. states: "[B]ecause of its property division provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses." U.M.D.A., commissioners' prefatory note, 9A U.L.A. 93 (1973). The comment to U.M.D.A. § 308 on maintenance states:

The dual intention of this section and Section 307 (property division) is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Id. at 160-61.

22. Id. § 308 & comment, at 160-61.

23. Id. § 308(a)(2), at 160.

24. The Law Commission, *The Financial Consequences of Divorce: The Basic Policy* 103, English L. Comm'n Rep. 3-4 (1980).

Here we have a new and appropriate starting point for thinking about property division on divorce, which we may call the "children-first principle." This principle rests on a notion that most people in our society probably would accept: the fact of having children impresses a lien upon all of the parents' income and property to the extent necessary to provide for the children's decent subsistence at least until those children reach the age of majority. Unlike the conflicting and competing principles on the rights of the *spouses* in current marital property law, this principle has the twin virtues that it is relatively non-controversial and that it applies to the majority of cases.

What would happen if this children-first principle were explicitly given the highest rank in marital property law? In the first place, until the welfare of the child or children was adequately secured, there would be no such thing as "marital" property, but only "family" property. This would reflect the economic and sociological reality of the circumstances of most people with children. In fact, it would not alter the outcomes of cases so much as it would sanction and encourage what most judges are already trying to do within the framework of the discretionary distribution system and its variants. John Eekelaar of Oxford University recently examined the reported decisions under the English version of discretionary distribution and discovered that one major principle above all emerges from the English case law on post-divorce financial support, though it is nowhere to be found in the English statutes. This principle is that "[a]dequate provision must be made to ensure the support and accommodation of the children of the marriage."²⁵

A parallel case-law development appears to be occurring within the United States.²⁶ It is safe to say that in the majority of cases involving dependent children, the best possible outcome usually will be no more than the piecing together, from property and income and in-kind personal care, of support for the basic needs of the children. One way or another, the household goods and matrimonial home, or its use for a period of time, usually will and should be awarded to the custodial spouse. The fact that the dwelling and household goods are apt to be the only significant property of a young couple with growing children means that marital property law (as distinct from support law) will often have nothing more to do once the question of the use of the dwelling (and accounting or compensation, if any, for such use) is settled. This explains why Max Rheinstein and the writer's comparative marital property survey in the 1970's showed a marked trend toward the development of a special legal regime for such property within marital property systems all over the

25. Eekelaar, *Some Principles of Financial and Property Adjustment on Divorce*, 95 *Law Q. Rev.* 253, 256 (1979).

26. See Annot., 19 A.L.R. 4th 239 (1983).

Western world.²⁷ If there is other property, however, the children-first principle would require that title and time of acquisition be disregarded until the welfare of the children and their custodian is adequately secured. (Implicit in all this are assumptions that child support, custody, spousal support and property division cannot be neatly separated from each other in practice and that, in child support, the needs of minor children include a component of custodial care.)

At this point one might well ask why the children-first principle needs to be explicitly introduced into existing law if it substantially reflects what judges are already doing. At the simplest level, the answer is that predictability and even-handedness would be served by making explicit what is implicit, and by making mandatory what is now optional. Beyond this, it is to be expected that giving express legal primacy to the welfare of children would improve consumer satisfaction with the system by basing it on a principle that both spouses and the public in general can understand and accept. It is much easier to find support for the idea that child-begetting involves lasting economic responsibility and engages all one's economic resources to the extent necessary, than that marriage does so. It may even be hoped that the principle will have a salutary effect on the attitudes of the spouses themselves—bringing out their better natures, as it were. In one recent English study, divorce litigants repeatedly expressed astonishment at how little attention was paid to their children in the divorce process.²⁸ The litigants thought the legal system had it backwards by concentrating on the dead marriage rather than on the living children, and they were right—not only about England but the United States as well.

Another benefit to be expected from the children-first principle is that it will bring out into the open the fact that childless and child-rearing marriages involve different social, political and moral issues and should therefore be analyzed separately. Just as corporate law has had to distinguish between publicly-held and close corporations, and commercial law between law for merchants' dealings among themselves and law for their dealings with consumers, so family law should now distinguish law for the married couple from law for the family with children. Finally (and this point suggests a corollary to the principle), if it is accepted that there is a high social interest in providing the best possible conditions for child-raising, there should be some form of recognition in family property division for the efforts of persons who have devoted a substantial part of their lives to child-raising, even if they are not currently custo-

27. Rheinstein & Glendon, *Interspousal Relations*, in 4 *Int'l Encyclopedia Comp. L.* 177 (A. Chloros ed. 1980); see also Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 *U. Chi. L. Rev.* 1089, 1114 (1983).

28. Elston, Fuller & Murch, *Judicial Hearings of Undefended Divorce Petitions*, 38 *Mod. L. Rev.* 609, 618-19, 632-33, 637, 640 (1975).

dians of minor children. Arguably, this should be so, at least if such a person has thereby incurred disadvantages in the job market or with respect to retirement income.

It is further suggested that it is probably more useful to look at this as a question of population, rather than of marriage, policy. The issue is whether the obligations incurred by begetting children should include responsibilities toward a spouse who has suffered detriment by performing the important social function of child-raising, and, more broadly, whether we should try to promote the welfare of future citizens by making child-raising a less risky career than it is at present. If the children-first principle can be extended to buttress a spouse's current position caused by past as well as present child care, then we can count among the cases that would be covered by the principle not only the sixty percent of divorces that involve minor children, but the undetermined, yet undoubtedly large, group of divorces involving spouses who have incurred economic disadvantages through raising children in the past. This gives us an impressive number of cases in which title to, and time of acquisition of, property might be disregarded in order to further important and widely recognized social goals. This is not to say that it will be a simple matter to determine what the form and modalities of compensation for past child-raising activities should be, or how the needs of children in a broken family are to be meshed with needs of children in a new family formed by the former provider. Judicial discretion would still be called for in all of these cases, but judges would be left in no doubt about the primary goal.

The children-first principle not only marks out the right direction (if not the precise path) in the cases it covers, but it also serves to bring the issues in the remaining, more controversial, cases into sharper focus. The cases that would not be included within the children-first principle are the following: divorces terminating childless marriages; divorces where there is property left over after the principle and its corollary have been satisfied; and cases where neither parent has incurred economic detriment as a result of child-raising. Within the framework just suggested, these would be the true "marital property," as distinct from "family property," cases. These are far from being the most frequently occurring situations, but they are ones which have excited lively controversy.

With respect to these true marital property cases, it is also possible to identify a property division principle which is more likely to attract consensus under modern conditions than any competing position. The principle is one which Max Rheinstein, Kevin Gray and the writer have each advocated,²⁹ and it will sound familiar to Louisianians: property which

29. M. Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe* 267 (1977); K. Gray, *Reallocation of Property on Divorce* 127-51,

is acquired by gainful activity during the marriage should be divided equally, in the absence of agreement to the contrary. This old principle of the Spanish community of gains has several virtues in the modern context: (1) it avoids the expense, unpredictability and vagaries of discretionary division; (2) it is a neat solution to the problem of how to distinguish short- and long-term childless marriages because it automatically proportions property-sharing to the duration of the marriage and excludes division of premarital property, gifts and inheritances identifiable as such; (3) it discourages, to a great extent, that useless rehashing of the history of the marriage which is invited by statutory guidelines on discretionary property division; (4) it has the merit of serving as a framework for private ordering of the financial aspects of divorce by enabling the spouses to know what the likely result will be if their affairs are settled by a judge. Some Americans might react to this notion the way Mark Twain once did when he heard about a new idea that displeased him: "It's un-American! It's immoral! Why, it's downright French!" But Louisianians have held fast to the community of acquets (which they received, not from France, but from Spain) and, if the writer is not mistaken, they have been served well by it.

If a random sample of American men and women were asked what system they favored for settling property disputes on divorce in the absence of children, it is doubtful that any significant number would want to give a lower court judge *carte blanche* to rearrange their affairs in the way that seems best to him or her. Yet this is just what now happens in most American states. It seems more likely that the average couple would choose a simple equal division of what they had acquired through their respective efforts during the marriage over the discretion system with its uncertainty and its controversy-provoking guidelines. In situations where exact justice is unattainable, most people understand and accept pragmatic rules like the equal division of acquets.

Let us now briefly consider the kinds of cases that would be left over after application of the "children-first" principle in the cases where it applies, and after equal division of acquets where that is called for. These cases would include situations where one spouse is left with some, or perhaps even a great deal of, individual property, or where there is great disparity between the spouses' income or earning power. There would also be cases where one spouse is not only in a weaker economic position than the other, but also is disabled or otherwise in need, unrelated to child-raising. Here it seems that the beginning of wisdom is to identify these problems for what they are. What is at stake is mainly the allocation

235-36, 266 (1977); Rheinstein, Division of Marital Property, 12 Willamette L.J. 413, 434-35 (1976); see also Stone, The Law Commission: Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods. (Law Com. No. 86), 42 Mod. L. Rev. 192, 198 (1979).

of costs between the public and private sectors. No principle seems as compelling in these cases as the "children-first" principle does in the cases to which it applies. Thus, different legislatures may well come to different conclusions about whether the ex-spouse or the taxpayer should pay in such cases.

The framework that has been presented here is in the nature of an architectural sketch without detailed specifications. The writer does not pretend that the instrumentation of this design would be simple. Nor would its implementation completely solve another major family law problem of the 1980's: continuing financial provision for children after divorce (child support). It is to be hoped that family law reform in the 1980's will address the problem of child support by being more realistic about what it costs to raise children and by utilizing better methods of collection and enforcement—such as direct deduction from the provider's paycheck. Here we have much to learn from Sweden. This supposedly socialist welfare state, while assuring decent subsistence from public funds to all families with children, has never wavered in putting primary responsibility for child support where it belongs—on the parents.³⁰ Sweden's support enforcement procedures are among the most efficient in the world.

At this juncture, one may wonder whether a possible drawback in making the welfare of minor children the central issue in cases where they are present will encourage more of that particularly destructive form of litigation in which one spouse puts, or threatens to put, the other's fitness for custody in issue in order to prevail in financial matters. The California experience, as reported by Weitzman and Dixon, is encouraging on this point. In that state, no-fault divorce did not, as many had feared, lead to an increase in custody litigation for leverage in financial matters.³¹ Ideally, of course, both the "children-first" principle and the equal division of acquests rule should be implemented in connection with, and in turn should aid the functioning of, non-adversarial divorce procedures.

It is encouraging that the idea of giving priority to the interests of children in cases where they are involved seems to be acquiring a certain momentum, which may someday lead to a complete reconceptualization of the field of marital property law and its reorganization into an area that might better be called family property law.³² In England, a new

30. A. Agell, *Paying of Maintenance in Sweden*, 4-7, 10-19, 22-23 (1983).

31. Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. Rev. 471, 490 (1979).

32. The English family law scholar, John Eekelaar of Pembroke College, Oxford, has urged that a "fundamental distinction should be made . . . between marriages in which children have been reared and childless marriages," and has also endorsed the notion that equal division of acquests may be the most appropriate principle for winding up the property aspects of childless marriages. J. Eekelaar, *Family Law and Social Policy*, 121 (2d

matrimonial and family proceedings bill which is currently making its way through Parliament retains the system of discretionary distribution, but would amend the guidelines to require judges to give priority to the welfare of children.³³ If adopted, depending on how English judges interpret and apply it, this new provision could transform English property division and support law. As public awareness spreads of the extent of the child support problem in the United States and of the precipitous drop in living standards experienced by custodial parents and children after divorce, the need to systematically reformulate the law governing divorces involving children will become increasingly apparent. This will perhaps provoke a long needed reappraisal of the rights and responsibilities of parents in principle. An appropriate place to start this process might be with a fundamental, but half-forgotten, text of modern liberal thought.

John Stuart Mill, in his famous essay *On Liberty*, endeavored to set forth a general principle by which the legitimacy of governmental interference with individual liberty could be tested. That principle was that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."³⁴ Less well-remembered is Mill's reasoning about why a general theory about liberty is necessary and why the traditional English suspicion of governmental power is insufficient to protect the individual. Mill argued that, without some such recognized general principle, liberty not only is often withheld where it should be granted, but is just as often granted where it should be withheld.³⁵ His prime example of a misplaced *grant* of liberty was drawn from family relations concerning children. Observing that "[i]t is in the case of children that misapplied notions of liberty are a real obstacle to the fulfillment by the State of its duties,"³⁶ the great modern apostle of liberty stated:

It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfill this obligation, the State

ed. 1984). In the United States, Professors Judith Younger and Thomas Oldham have both been critical of the fact that American law presently governs all marriages and divorces, short or long, childless or not, with a single set of rules. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45 (1981); Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. Fam. L. 263 (1984).

33. Maidment, *Family Law Practitioner*, 133 New L.J. 1053-54 (1983).

34. J. Mill, *On Liberty*, in *Utilitarianism, Liberty, and Representative Government* 81, 95-96 (1951) (1st ed. 1859).

35. *Id.* at 95, 215.

36. *Id.* at 215.

ought to see it fulfilled, at the charge, as far as possible, of the parent.³⁷

Mill is well-known for having contended that laws making divorce difficult to obtain were an impermissible interference with individual freedom, but it is likely that he would be astonished if he could see the ease with which spouses today can divorce not only each other but, *de facto*, their children. To him it was evident that "[t]he fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life."³⁸ He deplored "current ideas of liberty, which . . . would repel the attempt to put any restraint upon [a parent's] inclinations when the consequence of their indulgence is a life or lives of wretchedness and depravity to the offspring, with manifold evils to those sufficiently within reach to be in any way affected by their actions."³⁹

To sum up thus far, the writer has argued that family property and family support law is today in need of a basic reorientation in principle. Once that is accomplished, a wide array of techniques for its implementation are available for the legislator to choose from. But what must come first is a change of mind and heart. We must stop using an idea of "marital" property to sweep the problems of children in divorce under the rug. We must not let misplaced notions of individual liberty interfere with the development of efficient child support collection and enforcement programs. And we must commit ourselves to the notion that having children engages one's responsibility irrevocably.

PRIVATE ORDERING OF MARITAL PROPERTY UPON DIVORCE

Let us now turn briefly to a related area where law reform is urgently needed in most American states: regulation of the economic aspects of marriage by contract entered into prior to, or sometimes during, marriage. As civil-law countries have long recognized, no single set of legal rules for the distribution of property upon divorce or death will be suitable for the situation of each and every married couple. Not only do different couples have different needs and desires, but the requirements of the same couple with respect to their economic relationship may change over the course of their marriage. Furthermore, as all legal systems acknowledge to some extent, in the case of couples with dependent children the freedom of contract of the spouses has to be subordinated to the need to provide adequately for the children.

In most civil-law jurisdictions, the marriage contract is a well established institution whose legal status is relatively clear.⁴⁰ In the United

37. *Id.* at 216.

38. *Id.* at 220.

39. *Id.*

40. For a comparative survey of contractual regulation of marital property relations,

States, however, marriage contracts (except for separation agreements) have not been widely used, and American law traditionally has done little to facilitate them. Indeed, until quite recently, the law of most states was hostile to agreements which attempted to provide in advance of separation for the economic consequences of divorce, more hostile than with respect to agreements relating to property distribution upon death.⁴¹

Now it is clearly time for a change. We need a workable legal framework for contracts entered into prior and during marriage to regulate financial matters between the spouses. One of the most significant demographic developments of the latter part of the twentieth century is the increasing proportion of older people in the population. Greater longevity, together with the frequency of divorce and remarriage, creates a significant and legitimate demand for a type of financial planning by spouses that Americans used to consider unromantic. Unfortunately, the law of the various states on this subject is currently in disarray. Substantial differences exist among the states in the legal treatment accorded to contracts between spouses or prospective spouses. This fact in itself is a serious drawback to the use of such contracts, given our highly mobile population. In addition, within a single state there are apt to be inconsistencies among general contract law, law pertaining to contracts between spouses, divorce law, and succession law concerning the tests for and limits on the validity of agreements attempting to control the economic aspects of divorce or the distribution of property on death. Furthermore, although state after state is now abandoning older decisions that held antenuptial contracts looking toward divorce unenforceable in principle, there is now, with respect to any given contract, an unacceptably high degree of doubt about the extent to which it will in fact be enforced.⁴² These problems were recognized in the draftsmen's prefatory note to the 1983 Uniform Premarital Agreements Act which states that at present "there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of [premarital] agreements and a significant lack of uniformity of treatment of these agreements among the states."⁴³

As marriage contracts in view of divorce have become enforceable, courts have tended to consider some or all of the following factors in deciding whether and to what extent they will implement the parties'

see generally Rheinstein & Glendon, *supra* note 27, at 148-65. See also Comment, The Enforcement of Marital Contracts in the United States, Great Britain, France, and Quebec, 6 B.C. Int'l & Comp. L. Rev. 475 (1983).

41. See generally Clark, Antenuptial Contracts, 50 U. Colo. L. Rev. 141 (1979).

42. See generally Note, Antenuptial Contracts Governing Alimony or Property Rights upon Divorce: *Osborne v. Osborne*, 24 B.C.L. Rev. 469 (1983).

43. Unif. Premarital Agreements Act, Fam. L. Rep. (BNA) 201:0121, 201:0121 (Mar. 13, 1984) [hereinafter cited as U.P.A.A.]. The U.P.A.A. does not cover postnuptial or separation agreements.

agreements: whether or not there was fair disclosure of the extent of the parties' wealth at the time of the contract, whether the contract is "fair," "reasonable," or "unconscionable" (with some courts seeking to evaluate these qualities as they were at the time of contracting and others at the time of attempted enforcement); how the provisions of the contract compare with the legal support obligations that they would displace; and whether enforcement of the contract would make one of the spouses a public charge.⁴⁴ Under alternative A of section 307 of the Uniform Marriage and Divorce Act, a marriage contract is just one factor among several that a court is to "consider" in determining whether its division of the spouses' property is equitable.⁴⁵

The unhappy fact is that the spirit of discretionary distribution seeped into the marriage contract law of the 1970's. Just as no one can now be sure how a couple's property will be distributed in a discretionary distribution state, no one can be sure whether an antenuptial agreement will hold up in a divorce proceeding, especially if a judge is allowed to determine whether the agreement is "fair" at the time of enforcement. Thus, the principal issue in this area for the 1980's is not the enforceability, but the problem of limits on enforceability of marriage contracts.

For persons with a substantial amount of property, the discretionary distribution revolution, together with the uncertain state of the law concerning the enforceability of agreements relating to marital property, is a disaster. It has become doubtful whether and to what extent inherited or premarital property can be kept separate or in the family line from whence it came. Nor can one be sure to what extent the fruits of a long first marriage can be secured for the children of that marriage when a later marriage ends.

Although the writer deplores the existing uncertainty about the enforceability of antenuptial agreements upon divorce, the solution to this problem cannot be simply that contracts between spouses on financial matters should be enforced in the same way as other contracts—particularly if one accepts the "children-first" principle put forward in the first part of this paper. That principle would dictate that we approach the problem of contracts in divorce similarly to the way it has been suggested above that we approach the problem of property allocation upon divorce. First, we must distinguish between childless marriages and those marriages in which children are present or have been raised. Without entering into details here, it is suggested that substantial limitations on freedom of contract in the latter case are appropriate, at least if there are dependent children at the time of divorce. And, in fact, when one examines existing law and the major law reform efforts relating to contracts between spouses,

44. Numerous illustrations are given in Clark, *supra* note 41; Note, *supra* note 42.

45. U.M.D.A. § 307, alternative A, 9A U.L.A. 142-43 (1973).

one finds universal agreement that spouses are not completely at liberty to affect adversely a child's right to support.⁴⁶

The next question of interest becomes whether there should be any special limitations (such as disclosure requirements) on the enforceability of marriage contracts between persons whose marriages turn out to be childless. The writer's own view is that there should be no special limitations on such contracts arising simply out of the fact that the contracting parties are spouses or prospective spouses. Even without such special limits, however, a significant degree of uncertainty may still shroud these agreements if "normal" contract rules are applied to them. How will the rather open-ended contract doctrines of good faith, unconscionability and duress be applied by the courts in marital cases? Since contract law generally has become more fluid, making it easier than ever for a party to avoid the consequences of an earlier bad bargain,⁴⁷ matrimonial lawyers can be expected to seize on vague contract law notions in the effort to overturn spouses' agreements.

Here, civil-law techniques may offer a way both to assure the procedural regularity of the contractual formation process and to provide an acceptable degree of certainty in the enforcement process. Assume for the moment that the current version of the Uniform Marital Property Act (U.M.P.A.) represents a reasonable substantive law treatment of the problem. The U.M.P.A. provides that spouses can agree before or during marriage with respect to property rights on death or divorce, or modification or elimination of spousal support,⁴⁸ subject to a requirement of good faith,⁴⁹ and subject to the rights of creditors,⁵⁰ bona fide purchasers,⁵¹ and children entitled to support.⁵² With respect to *antenuptial* agreements, the Act (deliberately tracking the 1983 Uniform Premarital Agreements Act) provides that such contracts will not be enforceable if they are not voluntary or if they are unconscionable when made *and* if the agreement was not accompanied by a fair disclosure, *and* the spouse attacking the agreement neither waived disclosure nor was on notice of the extent of the other spouse's assets.⁵³ The spouse against whom enforcement is sought has the burden of proof on all these points.⁵⁴ Where *postmarital*

46. H. Clark, *The Law of Domestic Relations in the United States* 497 (1968); U.M.D.A. §§ 306(b) & (f), 307(b), alternative A, 9A U.L.A. 135-36, 142-43 (1973); U.P.A.A. § 4(b), *Fam. L. Rep. (BNA)* 201:0123 (Mar. 13, 1984); *Unif. Marital Prop. Act* § 10(b), 9A U.L.A. 35 (Supp. 1983) [hereinafter cited as U.M.P.A.].

47. G. Gilmore, *The Death of Contract* 80-83 (1974).

48. U.M.P.A. §§ 3, 10(c)(3)-(4), 9A U.L.A. 26, 35 (Supp. 1983).

49. *Id.* § 2, at 26.

50. *Id.* § 8(e), at 33.

51. *Id.* § 9(c), at 35.

52. *Id.* § 10(b).

53. *Id.* § 10(g), at 36; cf. U.P.A.A. § 6, *Fam. L. Rep. (BNA)* 201:0124 (Mar. 13, 1984).

54. U.M.P.A. § 10(f), 9A U.L.A. 36 (Supp. 1983).

agreements are concerned, the U.M.P.A. imposes a higher standard: an agreement unconscionable when made will not be enforced.⁵⁵ Finally, the U.M.P.A. provides that if the contractual provisions on support would render one spouse eligible for public assistance, the court may require the other spouse to pay enough support to avoid such eligibility.

Let us take these provisions as one reasonable solution of the problem. What can a spouse endeavoring to limit economic exposure in divorce do to minimize the chances that a contract governed by this or a similar statute will be held unenforceable because of duress, unconscionability or violation of the good faith obligation?

Theoretically, independent representation of both spouses is advisable. The risks for the relationship of the parties from lawyers' exerting their best efforts on behalf of their clients in this situation are, however, not negligible. In civil-law countries, of course, this problem is nicely handled by execution of the contract before a civil-law notary who advises both parties and whose authentication lends great evidentiary weight to the instrument.⁵⁶ The common requirement of judicial approval of any change in the contract further promotes the widespread confidence in civil-law countries that such agreements will be enforced as written. Although the notary (in the civil law sense) does not exist in American common-law jurisdictions, it is interesting to note a few recent statutory attempts to achieve for marriage contracts something like the effect of execution before a civil-law notary. New York, for example, provided in 1980 that marital property agreements would be valid and enforceable if acknowledged and proved in the manner required for a deed to be recorded.⁵⁷ Minnesota has a law, adopted in 1979, which provides that antenuptial agreements are enforceable if there has been disclosure of assets and opportunity to consult counsel, and if the agreement is executed before two witnesses and acknowledged.⁵⁸

Perhaps some more progress along these lines could be made by taking a leaf from probate law. Most questions about the enforceability of marriage contracts involve the circumstances at the time of execution. Thus,

55. *Id.* § 10(i).

56. For the role of the civil-law notary, see generally N. Horn, H. Kötz & H. Leser, *German Private and Commercial Law: An Introduction* 44 (T. Weir trans. 1982); Brown, *The Office of the Notary in France*, 2 *Int'l & Comp. L.Q.* 60 (1953); On how the notarial office survived and was transformed in Louisiana, see Burke & Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 *Tul. L. Rev.* 318 (1976).

57. N.Y. Dom. Rel. Law § 236(B)(3) (McKinney Supp. 1983). The statute is a litigation breeder, however, in its requirement that terms governing support, as distinct from property division, must be "fair and reasonable" when entered and "not unconscionable at the time of entry of final judgment." *Id.*

58. Minn. Stat. Ann. § 519.11 (West Supp. 1983). The statute expressly permits spouses to bar each other from participating in "non-marital" property.

the best time to establish such things as voluntariness and disclosure will also be at the time of execution, and not years later when memories have failed, one party is dead, or both parties are engaged in bitter marital strife. To resolve the analogous problem when a testator wishes to head off a will contest, a few American states, borrowing from the civil law, have made available the authenticated (or, as it is known in Louisiana, the nuncupative) will, which is very difficult for contestants to set aside after the death of the testator because of the formalities used to assure regularity at the time of execution.⁵⁹ An optional system of heightened procedural requirements and formalities for execution of marriage contracts (along the lines of the procedure for authenticated wills) would be feasible and useful under modern American conditions.

Louisiana is well-situated to lead the way toward a rational American marriage contract law. Contractual regulation of marital property relations is already recognized in the Civil Code as normal and legitimate,⁶⁰ and a statutory procedure for authentication of wills is already in place.⁶¹ Thus, more than other states, Louisiana is in a position, if it desires, to develop devices which could promote the reliability of marriage contracts by establishing high quality evidence of their validity at the time of execution.

PROTECTION OF FAMILY MEMBERS AGAINST DISINHERITANCE

Thus far, this paper has discussed the problem of the limits on enforceability of marriage contracts mainly with reference to the law of the forty-nine common-law states. In Louisiana and in most civil-law countries, however, there is another very significant limit on the freedom of the spouses to arrange their financial affairs by contract, and that is the prohibition against varying the order of succession.⁶² Civil-law systems typically protect children of all ages (and sometimes ascendants and other descendants) from disinheritance by securing to them a minimum share of the decedent's estate which cannot be defeated by will or *inter vivos* transaction.⁶³ There has been considerable debate from time to time in Louisiana over whether it is necessary or desirable to retain the forced heirship provisions of the Louisiana Civil Code, and, in 1981, these provisions were significantly weakened.⁶⁴ It is true that this peculiarity of

59. See M. Rheinstein & M. Glendon, *The Law of Decedents' Estates* 198-99 (1971); Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63, 69-72 (1978).

60. La. Civ. Code arts. 2328, 2329, 2331, 2336.

61. La. Civ. Code arts. 1578-1580.

62. La. Civ. Code art. 880.

63. See, e.g., La. Civ. Code arts. 1493, 1494, 1497; see also M. Glendon, *supra* note 29, at 284-88.

64. See, e.g., Leman, *In Defense of Forced Heirship*, 52 Tul. L. Rev. 20 (1977); Le Van, *Alternatives to Forced Heirship*, 52 Tul. L. Rev. 29 (1977); Nathan, *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 Tul. L. Rev. 5 (1977). Among other changes

Louisiana law is inconsistent with the law of other American states where only the surviving spouse benefits from the major protective devices of succession law. As older people with grown children increasingly enter second or third marriages for companionship, however, the question arises whether the time has come for common-law states to reexamine their law which leaves a testator free to disinherit his children in all cases.

At the same time, the moment seems opportune to reconsider the forced share for spouses which is presently found in the law of most states. If the forced share was ever needed, it was in the situation where one spouse held title to all the assets and the other spouse had no income or property, as frequently was the case in housewife marriages under the old separate property system. Most community property systems do not have the institution of the forced share for spouses because equal coownership of the community funds means that upon the death of one spouse the community is divided: one half belonging to the survivor and the other half forming part of the estate of the decedent (upon which the forced share for children is calculated). To put this another way, the equal division of acquests in traditional community property systems was a functional substitute for the forced share in separate property systems and vice versa. Now that the traditional separate property system has been displaced by discretionary distribution laws upon divorce, and would be displaced generally by the presumption of equal coownership of all marital property contained in the proposed Uniform Marital Property Act,⁶⁵ the law of decedents' estates is inevitably affected.⁶⁶ As the common-law states move by statutory or case law developments toward a situation where the spouses are treated as coowners of at least the property they acquire during the marriage (and where as under the U.M.P.A. *all* property of the spouses would be initially presumed to be owned equally),⁶⁷ the need for a forced share for spouses is far from self-evident.⁶⁸ This is yet another area where law reformers in common law jurisdictions may, if they choose, benefit

made by a 1981 amendment, the forced share of one child was reduced from a third to a quarter of the parent's estate. La. Civ. Code art. 1493.

65. U.M.P.A. § 4(c), 9A U.L.A. 27 (Supp. 1983).

66. See Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 Creighton L. Rev. 95 (1983) (pointing out the growing incoherence of state law relating to the rights of a surviving spouse in the light of recent changes in the roles of women and developments in marital property law).

67. U.M.P.A. § 4(b), 9A U.L.A. 27 (Supp. 1983).

68. Forced heirship for the surviving spouse is criticized by John H. Langbein of the University of Chicago Law School in a forthcoming paper in which he advocates a "time-served" approach that would vary the property rights of the surviving spouse with the duration of the marriage on the theory that duration is the best mechanical proxy for the relevant variables of need, contribution, conduct, and desert. See also Volkmer, *supra* note 66, at 152 (arguing that the coownership feature of U.M.P.A. § 4, 9A U.L.A. 27 (Supp. 1983), was meant "to totally replace existing forced share legislation in the common law states").

from comparative studies. But as the question of the rights of the surviving spouse is beyond the scope of this paper, let us put it aside on this occasion in order to return to the situation of children in succession law.

A recent American Bar Foundation study sheds some interesting light on the extent to which existing succession law in both community and non-community property states reflects the current testamentary preferences of most Americans.⁶⁹ While a narrow majority of the persons interviewed stated that they wanted their entire estates to pass to their surviving spouse in the situation where both spouse and children of the marriage survived, a very substantial minority wanted their estates to be divided between spouse and children in that situation.⁷⁰ The research supported the results of earlier studies which had identified the case where children from a *previous* marriage and a current spouse survive as an especially troublesome one.⁷¹ This special case can be expected to be increasingly important. It is therefore time to begin to rethink the way succession law operates in cases where children from a previous marriage are in competition with a surviving spouse, or with children from a later marriage. Particularly troublesome situations arise when the surviving children are the offspring of a long marriage during which most of the decedent's property was acquired (perhaps even by inheritance from the former spouse) and the surviving spouse was married to the decedent for a relatively short time. Should the children of the earlier marriage be protected to some extent against a will or inter vivos arrangements that leave everything to their parent's companion in old age?

If, as is expected, this type of question becomes increasingly urgent in the near future, legislators may be tempted, or induced, as they were in the case of property division upon divorce, to turn the matter over to the judiciary for resolution by the exercise of discretion in each individual case.⁷² This was the choice made by England (following the example of New Zealand) in 1938.⁷³ Given the American experience with discretionary distribution on divorce, however, it would be unfortunate indeed if recourse to this type of solution were to turn the relatively smooth-functioning law of decedents' estates into another field day for matrimonial lawyers. If comparative law teaches anything, it is the necessity to be aware of the context of legal rules and institutions. Anyone who advocates the importation of the English system of applications for discretionary maintenance or allowances from a decedent's estate by disappointed

69. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 *Am. B. Found. Research J.* 319.

70. *Id.* at 359.

71. *Id.* at 364-70.

72. Suggestions to this effect appear in the literature from time to time. See, e.g., Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 *U. Miami L. Rev.* 497 (1977).

73. M. Glendon, *supra* note 29, at 280-82.

relatives and others should ponder very carefully the differences between the English and the American judiciary and legal professions, as well as the differences in their law of civil procedure. A legal device that may operate in a relatively unobjectionable manner in a system like the England's where most civil disputes are tried without a jury, where discovery is restricted, and where the expenses of litigation are borne by the losing party, can and probably would turn into a source of expensive and bitter litigation in the United States.

As with property division upon divorce, the alternative to a system of judicial discretion is some system of fixed rules. The latter has characterized the traditional approach of the civil law systems and Louisiana to the protection of children against disinheritance. It may be too soon for the common-law states to accept the idea of a forced share for children as a way of dealing with problems generated by the formation of successive families,⁷⁴ but certainly Louisiana, which already has the forced heirship institution, should think long and hard before giving it up or further impairing it just as it seems to be responsive to a newly emerging and important social need.

CONCLUSION

This paper has ranged over three loosely related subjects that at present are not handled well in American law: division of property on divorce, marriage contracts, and protection of children against disinheritance. What ties these three topics together, however, is that a proper resolution of the legal problems of the 1980's in each area depends upon a long overdue reconsideration of the economic rights of children. The danger in each area is that legislatures and law reformers have been all too ready to see relatively unfettered judicial discretion as a quick fix. The reason the writer chose to address these three subjects in connection with the Family Law Colloquium is that, with respect to each one, Louisiana already possesses a legal device which holds special promise for resolving contemporary problems: the principle of equal division of acquests, the existing legal framework for the treatment of marriage contracts, and the institution of forced heirship. It is the writer's sincere hope that, as law reform in this state proceeds, the modern advantages of these venerable institutions of the civil law will be held firmly in view.

74. One writer has recently suggested that the common-law states should consider following Louisiana's example, however. See Haskell, *Restraints upon the Disinheritance of Family Members*, in *Death, Taxes and Family Property* 105, 114-15 (E. Halbach ed. 1977).

